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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLEY VULCAN,

Defendant and Appellant.

C060463

(Super. Ct. No. 07F10930)

After defendant Charley Vulcan's motion to suppress was denied, and in exchange for the dismissal of other charges, he pled no contest to possession of cocaine base, and admitted allegations that he had a strike conviction and had served four prior prison terms. The trial court sentenced defendant to prison for a total of 10 years, and defendant timely filed this appeal.

Defendant contends the trial court should have granted his suppression motion because peace officers had no cause to detain him, and then acted unreasonably by forcibly searching his mouth. We conclude the record at the suppression hearing supports the trial court's rulings. We shall affirm.

THE SUPPRESSION HEARING¹

On August 19, 2007, at about 7:30 p.m., Deputy Jack Noble was on patrol near 14th Avenue and 44th Street, an area known for drug activity. He saw a car parked in the middle of 44th Street, with a person outside speaking to the driver. He drove by the intersection, turned around and returned. The car had backed up, and he saw the person had his hands inside the car, touching the driver's hands. Although he did not see any object pass between the two people, he believed he was seeing a drug deal in progress. The person in the street walked away upon seeing Deputy Noble. Deputy Noble then stopped the car.

Defendant was the driver and said he was on probation. His passenger was also on probation. Deputy Noble patted defendant down and put him in the patrol car. When Deputy Rogers arrived to assist, Deputy Noble had defendant come out of the patrol car. Because defendant was mumbling and not opening his mouth, Deputy Noble asked him to open his mouth. When Deputy Noble saw a white baggie in defendant's mouth, he placed his hands below defendant's chin, at the top of his neck, to keep defendant from swallowing it. As Deputy Rogers held defendant in a wristlock, defendant was ordered to spit the baggie out. Deputy Noble was concerned that if defendant swallowed the baggie and it broke,

¹ We omit facts adduced at the suppression motion that pertained to a traffic stop on November 19, 2007. The legality of that stop is not contested on appeal.

it could kill defendant, and he was also concerned that defendant would swallow it to destroy evidence.

Deputy Noble testified he did *not* use a choke hold and he demonstrated in court how he held defendant's chin. He held defendant's throat for two seconds.

Defendant testified Deputy Rogers held the back of his neck with one hand and pulled at his dentures with the other, causing him to lose two teeth and feel pain, while Deputy Noble hit his neck and squeezed defendant with his hands around defendant's throat, for longer than two seconds. Defendant was impeached with a felony conviction.

The trial court concluded that even though Deputy Noble did not see an object pass between the person in the street and defendant, given the location, a known narcotics area, and the fact that a car was stopped in the middle of the street, what Deputy Noble did see gave him cause to believe a drug deal had occurred. Also, stopping a car in the middle of the street is a traffic violation. The trial court believed Deputy Noble's testimony over defendant's testimony about the manner in which Deputy Noble held defendant's neck, and found reasonable force was used to prevent defendant from swallowing the baggie.

STANDARD OF REVIEW

In reviewing defendant's claims, "We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth

Amendment, we exercise our independent judgment.'" (*People v. Weaver* (2001) 26 Cal.4th 876, 924.)

DISCUSSION

I

The Record Supports The Trial Court's Finding That The Detention Was Lawful

Defendant contends Deputy Noble had no grounds to stop his car. We disagree.

Putting aside the trial court's conclusion that defendant's act of stopping in the middle of a street is a traffic infraction, Deputy Noble had cause to detain defendant to investigate suspected drug dealing.

In attacking this ground, defendant relies in part on *Cunha v. Superior Court* (1970) 2 Cal.3d 352. *Cunha* and a companion acted furtively, as if to see if they were being watched, while approaching People's Park, a known area for drug sales, then "The companion appeared to extract an object -- although Officer McCarthy could not actually see an object -- while petitioner extracted what appeared to be money. The two placed their hands together in an apparent exchange." (*Cunha*, at pp. 354-355.) The California Supreme Court concluded "the officers did not simply detain but proceeded immediately to an arrest," and then concluded that the officers did not have probable cause to support that arrest. (*Id.* at pp. 356-358.)

But defendant concedes that we must apply the standard applicable to a *detention*, which is not as stringent as the

standard applicable to an arrest. The California Supreme Court has distinguished the two standards as follows:

"Probable cause to arrest exists when the facts and circumstances known to the arresting officer "'warrant a [person] of reasonable caution in the belief that' an offense has been or is being committed [by the person to be arrested].'" [Citations.] By contrast, the temporary detention of a person for the purpose of investigating possible criminal activity may, because it is less intrusive than an arrest, be based on 'some objective manifestation' that criminal activity is afoot and that the person to be stopped is engaged in that activity." (*People v. Souza* (1994) 9 Cal.4th 224, 230.)

"'[T]he essence of all that has been written is that the totality of the circumstances--the whole picture--must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" (*People v. Souza, supra*, 9 Cal.4th at p. 230.) Further, "the evidence relied on by police officers to justify the seizure of a person 'must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.'" (*Id.* at p. 240.)

Applying this test, we uphold the trial court's conclusion that Deputy Noble had grounds to detain defendant.

The area was known for drug dealing. "An area's reputation for criminal activity is an appropriate consideration in assessing whether an investigative detention is reasonable under

the Fourth Amendment." (*People v. Souza, supra*, 9 Cal.4th at p. 240.)

Defendant engaged in suspicious behavior. He stopped his car in the middle of the street at night in order to interact with a person on the street, and remained in that position -- and actually backed his car up -- during the time it took Deputy Noble to drive past the intersection, turn around, and return. Deputy Noble then saw defendant and the person on the street touching hands, and the person walked off when the person saw the deputy. Although Deputy Noble did not see anything change hands, it was reasonable to suspect that he had just witnessed a drug deal and to detain defendant to investigate that suspicion.

Although no two cases are identical, a number of cases have concluded that similar conduct justified a detention.

In *People v. McGriff* (1990) 217 Cal.App.3d 1140, two detectives in the evening "saw two vehicles parked side by side facing in opposite directions in the middle of the street. The police were aware that sales of drugs between buyers in vehicles and sellers on the streets were common in that area. Several people, including appellant, were standing near both cars. Detective Liddicoet saw the people lean into the cars and observed an exchange of objects between the passengers and those outside the cars. [¶] As the police vehicle approached, the cars drove away and appellant and some of the others fled through a nearby back yard." (*Id.* at p. 1142.) The detention was upheld because the officers saw an exchange of items, the vehicles and persons nearby were acting suspiciously, and fled

when the police came. (*Id.* at p. 1144-1145.) In *People v. Butler* (2003) 111 Cal.App.4th 150, after receiving an anonymous tip of drug dealing, an officer "saw conduct he believed, based on his training and experience, was a drug transaction." (*Id.* at pp. 161-162.) *Santos v. Superior Court* (1984) 154 Cal.App.3d 1178 observed that: "While an exchange of unidentified objects in a high narcotics area may not provide probable cause for arrest [citations], that activity and the possible violation of [a loitering ordinance] furnished grounds for detaining petitioner for questioning." (*Id.* at p. 1184.)

While none of these cases are exactly on point, they show that suspicious behavior objectively resembling drug dealing can support a peace officer's decision to detain a person to investigate whether, in fact, drug dealing is taking place.

The fact that Deputy Noble could not tell if an object was exchanged, and the fact that defendant might have been having an innocent chat with a friend, does not lessen the objective suspiciousness of defendant's behavior: People do not normally innocently stop their cars in the middle of the street and chat with friends at night in an area known for drug dealing. Viewing all of the circumstances before him, we conclude Deputy Noble had an "'objective manifestation' that criminal activity is afoot" and that defendant was "engaged in that activity." (*People v. Souza*, *supra*, 9 Cal.4th at p. 230.) Accordingly, the record supports the trial court's ruling that the detention was lawful.

II

The Record Supports The Trial Court's Finding That The Search Of Defendant's Mouth Was Lawful

Defendant contends there was no justification for searching his mouth, and the deputies used excessive force in retrieving the white baggie. We disagree with defendant.

"The police may, in order to prevent the destruction of evidence, reach into a person's mouth to recover evidence if there is sufficient probable cause to believe a crime is being, or has been, committed. [Citation.] The mouth is not a 'sacred orifice' and 'there is no constitutional right to destroy or dispose of evidence.'" (*People v. Cappellia* (1989) 208 Cal.App.3d 1331, 1336.)

Defendant contends there was no probable cause to search his mouth, and no exigency supported the search. People do not store innocent white substances in baggies in their mouths. Given the suspicious behavior that justified the detention, once Deputy Noble saw the white baggie in defendant's mouth, he had probable cause to conclude it contained drugs. Further, he reasonably feared that defendant might swallow the baggie, which could endanger defendant's life and could destroy the evidence. Although defendant argues the amount of drugs *later found* in the baggie was small and purportedly would not have endangered defendant's life if swallowed, Deputy Noble did not know what drug or how much was in the baggie at the time he made the decision to extract it. Accordingly, it was lawful to search defendant's mouth.

Defendant also claims the manner in which the baggie was retrieved was brutal. We disagree.

"The police may not . . . use brutal or excessive force to recover evidence." (*People v. Cappellia, supra*, 208 Cal.App.3d at p. 1336.) "Police use of excessive force which shocks the conscience violates due process of law. [Citations.] Also, a search may by virtue of its intolerable intensity and scope violate the Fourth Amendment." (*People v. Johnson* (1991) 231 Cal.App.3d 1, 15.)

"California cases have uniformly held it is excessive force to choke or use a choke hold to make a defendant spit out evidence secreted in the mouth. [Citations.] California cases have also held it is not excessive force for the police to place their hands on a defendant's throat in order to prevent evidence from being swallowed, so long as they do not choke him." (*People v. Cappellia, supra*, 208 Cal.App.3d at p. 1336.)

"Whether choking or a choke hold occurred is a question of fact . . . and must be upheld if supported by substantial evidence." (*People v. Fulkman* (1991) 235 Cal.App.3d 555, 561; see *People v. Johnson, supra*, 231 Cal.App.3d at p. 16.)

Deputy Noble testified he did *not* use a choke hold and he demonstrated how he held defendant to keep defendant from swallowing the baggie. The trial court did not believe defendant's testimony on this point, and we are not free to reweigh the evidence. (*People v. Weaver, supra*, 26 Cal.4th at p. 924.)

Defendant asserts that his testimony showed Deputy Rogers "grabbed the top part of his partial, breaking off two teeth and jamming the partial into his gums, hurting him. . . . Although [Deputy] Noble testified that he did not observe any broken teeth [citation], it was [Deputy Rogers] [who] Mr. Vulcan asserted was the one who grabbed the partial. Since [Deputy Rogers] did not testify to refute Mr. Vulcan's assertion of unlawful force, Mr. Vulcan's assertion stands uncontradicted."

We disagree with this claim. The trial court disbelieved defendant. Defendant was free to call Deputy Rogers as a witness, but he did not do so. Defendant was also free to cross-examine Deputy Noble about what Deputy Noble observed Deputy Rogers doing. The fact Deputy Noble did not explicitly refute every aspect of defendant's story does not mean defendant's story stands uncontradicted.

Accordingly, we reject defendant's contention that the search of his mouth was unlawful.

DISPOSITION

The judgment is affirmed.

I concur: ROBIE, J.

HULL, J.

I concur in the result.

BLEASE, Acting P. J.